



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

August 19, 2011

Ms. Kelly Jean Heffner, Deputy Secretary  
Pennsylvania Department of Environmental Protection  
Office of Water Management  
Rachel Carson State Office Building  
400 Market Street  
Harrisburg, Pennsylvania 17105-8775

Re: PAG-13 - Phase II General National Pollutant Discharge Elimination System (NPDES)  
Permit for Municipal Separate Storm Sewer Systems (MS4s)

Dear Ms. <sup>Kelly</sup>Heffner:

This letter supplements my letter dated February 16, 2011, in which the U.S. Environmental Protection Agency (EPA) objected to the Pennsylvania Department of Environmental Protection's (PADEP) draft general permit referenced above. Following receipt of the objection letter, PADEP submitted its response to EPA's concerns on May 17, 2011 in the form of revised permit language, and stated its intent that this submission fully resolve the objection issues. What the Commonwealth submitted on the 90th day following the objection therefore met the requirements of 40 CFR 123.44(h)(1).

Since the May 17 submission, our agencies have had several clarifying discussions to address remaining concerns, most notably on July 12 and August 9, 2011, which resulted in a revised draft permit submission on August 10, 2011. This supplemented the May 17 submittal and incorporated additional recommendations. As you know, our respective agencies have now reached agreement on the issues identified in our February 16, 2011 letter, and we believe that the revised permit package dated August 10, 2011 reflects those agreements and resolves the objection issues. By this letter, EPA is removing its objection to the draft PAG-13 permit with the expectation that PADEP will withdraw its request for a public hearing and the commitments noted below will be met in the final permit and its implementation.

**Federally Required Minimum Control Measures (MCMs)**

EPA had objected to language in the draft permit that "the permittee will rely on PADEP's statewide program for issuing NPDES permits for Stormwater Discharges Associated with Construction Activities (PAG-2) to satisfy all requirements under Minimum Control Measure (MCM) #4 and all requirements under MCM #5." EPA objected to this language on the basis that PADEP's existing state program did not encompass all the requirements listed under both MCM #4 and MCM #5; therefore, a permittee's reliance on the state program would not have directly corresponded to compliance with PAG-13 requirements. In support of the objection, EPA provided two examples: (1) post-construction projects were not subjected to a technical review unless they occur in high-quality or exceptional value watersheds under 25 Pa. Code § 93.4b; and (2) post-construction projects were not required to include a necessary written inspection program or an inventory of post-construction BMPs shall be maintained. EPA further



stated that, in order to resolve this portion of the objection, PADEP must forfeit responsibility for MCM#5 and designate accountability to the permittee.

In response to this concern, Pennsylvania has submitted information to EPA demonstrating that its state regulations for construction and post-construction have been expanded to include a number of new requirements that ensure that permittees will be required to comply with federal requirements for MCM #4 and #5. We agreed that the permittee can rely on PADEP for MCM # 4 in its entirety, but can only rely on PADEP for MCM #5, BMP's 1, 2, & 3, and cannot rely on PADEP for BMP's 4, 5, & 6 under MCM#5. For example, the state regulations for erosion and sediment (E&S) control now include a requirement that E&S plans must contain plan maps that show, *inter alia*, drainage patterns, 25 Pa. Code § 102.4(a)(5), as well as a continuing obligation for compliance – even upon property transference, *See* 25 Pa. Code § 102.8(m)(2).<sup>1</sup> In addition, PADEP stated that it is held responsible for tracking activities under Chapter 102 and PAG-2.

### **Chesapeake Bay Total Maximum Daily Load (TMDL)**

EPA had also objected to the draft permit because it indicated that any regulated stormwater discharge from an MS4 where the Chesapeake Bay TMDL is applicable be consistent with the Pennsylvania Watershed Implementation Plan (WIP). However, federal NPDES Program regulations require that effluent limits be “consistent with the assumptions and requirements of any available *wasteload allocation* for the discharge” approved by EPA. 40 C.F.R. 122.44(d)(1)(vii)(A) (emphasis added). Revised permit language was included in Pennsylvania’s May 17, 2011, response to EPA’s objection. Pennsylvania has made the requested change at Part C.1 (“For each regulated small MS4 that discharges stormwater into any portion of a receiving water with applicable wasteload allocations in approved TMDLs, permittees shall develop, submit to DEP for approval, and ensure implementation of a written MS4 TMDL Plan that is designed to achieve pollutant reductions consistent with the conditions and assumptions of the applicable wasteload allocations in the approved TMDLs.”).

### **Other Issues**

In addition, EPA had expressed that Pennsylvania appeared to interpret the geographic scope of the storm sewer system as encompassing only the pipes that are part of the collection

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<sup>1</sup> Section 102.8(m)(2) provides:

For any property containing a PCSM BMP, the permittee or co-permittee shall record an instrument with the recorder of deeds which will assure disclosure of the PCSM BMP and the related obligations in the ordinary course of a title search of the subject property. The recorded instrument must identify the PCSM BMP, provide for necessary access related to long-term operation and maintenance for PCSM BMPs and provide notice that the responsibility for long-term operation and maintenance of the PCSM BMP is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees, and provide proof of filing with the notice of termination. . . .”).



system. In contrast, EPA explained that, under federal regulations, the regulated system includes the entire storm sewer system located within the designated/urbanized boundary. Furthermore, all drainage from the urbanized area into the MS4 is covered by the MS4 permit and, therefore, the ultimate responsibility for regulating and controlling discharges into the system rests with the permittee. The language in PAG-13 is consistent with the federal definition,<sup>2</sup> and PADEP has agreed to follow EPA's interpretation of the scope of the MS4, *e.g.*, on all of its outreach materials. There were no specific changes made in the permit language to address EPA's concerns. We appreciate PADEP's commitment that outreach workshops sponsored on the renewed permit planned for applicants be jointly supported by DEP and EPA and that there would be collaboration in review and delivery of presentation materials on this point.

Further, EPA previously indicated that it was concerned with the content and review and approval process for the TMDL Implementation Plans required by the permit. PADEP has resolved this issue through specific requirements as part of the Chesapeake Bay Pollutant Reduction Plans that each permittee with a regulated small MS4 located in and discharging to receiving watersheds draining to the Chesapeake Bay will be required to submit such a Plan. *See* Section 3.C of the Permit. The required Plans are also expected to address EPA's concern that the draft permit did not include clear implementation requirements for permittees to follow. As we have discussed earlier, EPA would like to review at least an initial set of plans submitted to verify the direction that they are taking.

EPA has also observed that the current annual reporting format is not an effective tool for assessing the MS4 program. Based on requirements in the revised permit, EPA believes that this issue has been resolved. *See e.g.*, EPA Fact Sheet at 10.D ("Your annual reports must include a summary of your progress with developing, submitting to DEP for approval, and ensuring implementation of your Chesapeake Bay Pollutant Reduction Plan. If you are required to prepare, implement, and enforce an MS4 TMDL Plan, then your annual report also must summarize your progress with the MS4 TMDL Plan in accordance with Section II.F.2 of the Authorization to Discharge."). EPA has offered contractual and other support to PADEP's efforts to develop a more useful and streamlined annual report form that will both ease the burden on both the permittees and PADEP evaluators.

Separate from the Chesapeake Bay TMDL objection issues identified above, we also discussed in our recent meetings how the schedules for issuance of the permit and development of TMDL implementation plans would work over time. EPA urges PADEP to reconsider the time frame for completion of the Chesapeake Bay Pollutant Reduction Plans in this permit when considering the delayed effective date of these new provisions coupled with the likely extension of the effective date of this permit renewal. This would help ensure that the early benefits of

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<sup>2</sup> At Part A.1, PAG-13 provides that Municipal Separate Storm Sewer means "[a] conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains), which is all of the following: (1) owned or operated by a state, city, town, borough, township, county, district, association or other public body (created under state law) having jurisdiction over disposal of sewage, industrial wastes, stormwater or other wastes, (2) designed or used for collecting or conveying stormwater, (3) not a combined sewer, and (4) not part of a Publicly Owned Treatment Works as defined at 40 CFR § 122.2." This definition is substantially identically to the federal definition at 40 C.F.R. § 122.26(b)(8).



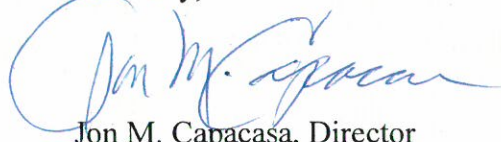


these important storm water controls are secured, in line with the Commonwealth's Watershed Implementation Plan to achieve a 2017 deadline. We believe that 12 months, rather than 24 months, is sufficient time for completion when considering the extended effective date of this permit coupled with the deferred deadline for plan submission.

In the May 17, 2011 response to EPA's objection, PADEP requested that EPA hold a public hearing on its objection to the draft permit. By documenting the resolution of the objection issues with this letter today, and considering the agreements reached at the August 9 meeting and documented in the August 10 proposed permit submission, EPA considers PADEP's request for a public hearing on the objection to be moot.

Should the proposed permit be modified from the August 10, 2011 version, we request that it be resubmitted for our review. If you have any questions, please contact me, or Mrs. Evelyn S. MacKnight, Chief, NPDES Permits Branch, at (215) 814-5717. Thank you for your cooperation in this matter.

Sincerely,



Jon M. Capacasa, Director  
Water Protection Division

cc: Mr. Glenn H. Rider, PA DEP  
Mr. Ken Murin, PADEP  
Ms. Margaret Murphy, Esq., PADEP

